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Title IX and School District Liability for Student-On-Student Sexual Harassment: *Davis v. Monroe County Board of Education*

Kimberly D. Jones
Legislative Attorney
American Law Division

Summary

In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court, in a 5-4 decision, addressed the issue of liability of a school district for student-on-student sexual harassment. The case was brought under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in educational programs or activities that receive federal funding. The Court held that the school district is liable under "[a] private Title IX damages action . . . only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

The U.S. Supreme Court has decided the standard of liability that courts should apply in determining whether a school district should be held responsible for monetary damages for student-on-student sexual harassment. Justice O'Connor, writing for the majority in *Davis v. Monroe County Board of Education*, held that "[a] private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[1]

The case began when Aurelia Davis sued in federal district court, on behalf of her daughter LaShonda, against the Monroe County Board of Education and two school officials. The Davis' alleged that the school district and the named school officials violated

[1] No. 97-843, slip op. at 1 (U.S. May 24, 1999). For a general overview of sexual harassment in education see CRS Report 98-798, *Sexual Harassment in Education: Recent Legal Developments Under Title IX of the Education Amendments of 1972*, by Kimberly D. Jones.

Title IX of the Education Amendments of 1972 by failing to prevent a fellow student from sexually harassing LaShonda. Davis' suit sought $500,000 in compensatory and punitive damages.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs or activities receiving federal funding. In *Franklin v. Gwinnett County Public Schools*, the Court held that the sexual harassment of a student by a teacher was discrimination based on sex and, therefore, a violation of the anti-discrimination mandate of Title IX.[2] The Court has also held that there is an implied private right of action under Title IX,[3] and that monetary damages may be recovered.[4] During its 1997 term, the Court decided *Gebser v. Lago Vista Independent School District*, which held that a school district is not liable for sexual harassment of a student by a teacher, "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[5]

LaShonda Davis alleges that during her 5th grade year, she was subjected to at least eight incidents of sexual harassment committed by a male student, G.F., who was in several of her classes.[6] She allegedly reported these incidents to three of her teachers, to the school's principal, and to her mother. In addition, Aurelia Davis complained to the school principal and to two teachers about the incidents. Davis alleged that LaShonda's grades dropped, and she threatened suicide because of the harassing behavior. The Davis' argued that the school did not take appropriate action to end the harassment. The harassment stopped when the male student was charged with, and pleaded guilty to, sexual battery.

The Davis' complaint was dismissed by the district court, but on appeal was reinstated by a three judge panel of the 11th Circuit. The school board sought a rehearing of the decision before the full panel of the 11th Circuit. The full panel framed the issue as whether Davis' "allegations describe an injury for which the law provides relief."[7] Ultimately, the full panel reversed the three-judge panel and dismissed Davis' Title IX claim. The Davis'

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[2] 503 U.S. 60, 75 (1992).

[3] Cannon v. University of Chicago, 441 U.S. 677 (1979).

[4] Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

[5] Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 118 S. Ct. 1989, 1993 (1998). See also CRS Report, *Title IX and School District Liability for Sexual Harassment by a Teacher: Gebser v. Lago Vista Independent School District*, by Kimberly D. Jones.

[6] No. 97-843, slip op. at 2 (U.S. May 24, 1999). "According to petitioner's complaint, the harassment began in December 1992, when the classmate, G.F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.' . . . G.F.'s conduct allegedly continued for many months. In early February, G.F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class. . . . In mid-April 1993, G.F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner . . ." *Id.* at 2-3.

[7] 120 F.3d 1390, 1393 (11th Cir. 1997), *rev'd*, ____ U.S. ____, No. 97-843, slip op. (U.S. May 24, 1999).

appealed to the Supreme Court which granted the appeal and heard oral argument on January 12, 1999.

Summary of U.S. Supreme Court Decision in *Davis v. Monroe County Board of Education*

Justice O'Connor, writing for the majority, framed the issue in *Davis* as "whether, and under what circumstances, a recipient of federal educational funds can be liable [under Title IX] in a private damages action arising from student-on-student sexual harassment."[8] Title IX states in relevant part that, "No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[9] "Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies . . . may rely on 'any . . . means authorized by law,' including termination of funding to give effect to the statute's restrictions."[10]

Justice O'Connor notes that Title IX was enacted pursuant to Congress' power under the Spending Clause of the U.S. Constitution.[11] O'Connor points out that the spending clause creates a quasi-contract because the recipient agrees to accept certain conditions in exchange for the receipt of federal funds. Therefore, O'Connor reasons that "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue."[12] According to the majority's opinion, "'Congress [must] speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'"[13]

The school board argued that Title IX did not provide adequate notice that it could be held liable for student-on-student sexual harassment and that Title IX only applies to the actions of the grant recipient, not third parties.[14] Furthermore, the Board argued that it should not be held liable for the acts of a third party which it had little control over. Justice O'Connor disagreed with the board, finding that Davis was not suing the Board over the actions of the alleged harasser, but over the Board's "own decision to remain idle in the face of known student-on-student harassment in its schools."[15]

First, O'Connor points out that the administrative enforcement of Title IX "has long provided funding recipients with notice that they may be liable for their failure to respond

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[8] No. 97-843, slip op. at 6.

[9] 20 U.S.C.A. § 1681 (West 1990 & Supp. 1998).

[10] No. 97-843, slip op. at 7.

[11] U.S. Const. art. I, § 8, cl. 1.

[12] *Id*. at 8-9.

[13] *Id*. at 9 (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 24-25 (1981)).

[14] *Id*. at 9.

[15] *Id*. at 10.

to the discriminatory acts of certain non-agents."[16] Moreover, the Court notes that "common law . . . has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties."[17]

The Court opined that the school board, standing in its "custodial" role, had authority over the environment in which the harassment occurred.[18] In this case, the harassment took place "during school hours and on school grounds."[19] The majority then concluded "that recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[20] The Court's holding stresses that it is not meant to dictate the type of discipline that schools must use and urges lower courts to "refrain from second guessing the disciplinary decisions made by school administrators."[21] To ensure this, the majority states that the decision of school administrators will not be disturbed unless their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[22] The Court noted that "[A] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy . . . and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."[23]

O'Connor notes that Title IX "does not bar . . . private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute."[24] Relying on its decision in *Gebser*, the Court notes that a school district would not be liable for teacher-student harassment unless the school board had actual knowledge of the harassment and was deliberately indifferent. According to O'Connor, the "deliberate indifference" standard "sought to eliminate any 'risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions.'"[25]

O'Connor also relied on the *Gebser* decision in reiterating the Court's refusal to apply agency principles to Title IX, generally, and student-on-student sexual harassment specifically. Referring to the language of Title IX, which unlike Title VII, does not define or refer to "agents," the Court concluded that recognition of agency principles under Title

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[16] *Id*. at 12.

[17] *Id*. at 13.

[18] *Id*.

[19] *Id*. at 15.

[20] *Id*. at 16.

[21] *Id*. at 17.

[22] *Id*. at 17.

[23] *Id*. at 18.

[24] *Id*. at 11.

[25] *Id*. at 11 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-291).

IX "would conflict with the Spending Clause's notice requirement and Title IX's express administrative enforcement scheme."[26]

Justice O'Connor reasoned that a standard similar to the one established in *Gebser* could be applied to peer sexual harassment cases. "If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[27] These factors are interpreted by O'Connor "to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[28]

After applying the deliberate indifference standard to student-on-student sexual harassment, Justice O'Connor then turned to the definition of discrimination "in the context of a private damages action."[29] O'Connor concluded that "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims to access to the educational opportunities or benefits provided by the school"[30] The majority further defines discrimination as " behavior . . . serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."[31] Some factors the Court finds compelling are "the ages of the harasser and the victim and the number of individuals involved."[32] The Court explicitly notes "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender."[33]

The Court overturned the decision of the 11th Circuit Court of Appeals and reinstated the Davis' Title IX claim. While the Court could not gauge whether Davis could meet the standards articulated, it did point to several allegations to support reinstating her claim. O'Connor referred to her allegations of "repeated acts of sexual harassment," multiple victims, and the "negative effect on her daughter's ability to receive an education."[34] The Court also noted out that there was support for the conclusion that G.F.'s actions were severe, pervasive, and objectively offensive, and that Davis warranted an opportunity to

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[26] *Id*. at 8.

[27] *Id*. at 13.

[28] *Id*. at 14.

[29] *Id*. at 19.

[30] *Id*. at 19-20. "Whether gender-oriented conduct rises to the level of actionable "harassment" thus depends on a constellation of surrounding circumstances, expectations, and relationships." *Id*. at 20 (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998).

[31] *Id*. at 22.

[32] *Id*. at 20.

[33] *Id*. at 21.

[34] *Id*. at 23.

"show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment."[35]

Justice Kennedy, wrote the dissenting opinion which was joined by Chief Justice Rehnquist, and Associate Justices Scalia and Thomas. Kennedy argued that "[s]chools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students."[36] First, Kennedy points out that legislation enacted pursuant to the Spending Clause is in the nature of a contract and that under previous decisions recipients are entitled to clear notice of the contract terms.[37] Secondly, Kennedy cautions the Court about fashioning private damages remedies under Title IX, since the private right of action is imposed judicially, not statutorily.[38] Next, Kennedy finds that nothing in the language of Title IX or its regulations provides clear, unambiguous notice that a recipient may be held liable for monetary damages for student-on-student sexual harassment.[39] Kennedy also criticizes the majority's rejection of using agency principles as a guide for liability.

The dissent criticizes the majority's standard as unclear and therefore violative of the Spending Clause's clear notice requirement.[40] For example, the dissent notes that, unlike in *Gebser*, the majority did not indicate "the type of school employee who must know about the harassment before it is actionable."[41] Kennedy also takes issue with defining the behavior of typically immature youngsters as "sexual harassment" and "gender discrimination."[42] The dissent emphasizes that "schools are not workplaces and children are not adults," and the Court should not apply principles that have been used in the workplace to schools.[43] Ultimately, the dissent concludes that the majority's standard will result in a flood of lawsuits and divert funds away from educational institutions.[44]

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[35] *Id*. at 23.

[36] No. 97-843, slip op. at 5 (Kennedy, J., dissenting).

[37] *Id*. at 3.

[38] *Id*.

[39] *Id*. at 7.

[40] *Id*. at 19. "The majority thus imposes on schools potentially crushing financial liability for student conduct that is not prohibited in clear terms by Title IX and that cannot, even after today's opinion, be identified by either schools or courts with any precision." *Id*.

[41] *Id*. at 27.

[42] *Id*. at 21.

[43] *Id*. at 22.

[44] *Id*. at 27.